Filed 2/24/09 In re S.R. CA2/8

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re S.R., a Person Coming Under the Juvenile Court Law.	B208464 (Los Angeles County Super. Ct. No. CK 63183)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. B.L., Defendant and Appellant.	

APPEAL from an order of the Superior Court for the County of Los Angeles. D. Zeke Zeidler, Judge. Affirmed.

John L. Dodd & Associates and John L. Dodd, under appointment by the Court of Appeal, for Defendant and Appellant.

Raymond G. Fortner, Jr., County Counsel, James M. Owens, Assistant County Counsel, and Timothy M. O'Crowley, Senior Deputy County Counsel, for Plaintiff and Respondent.

SUMMARY

The issue in this case is whether the juvenile court failed to properly consider statutory provisions on relative placement preference (Welf. & Inst. Code § 361.3)[1] when it denied the father's petition under section 388 to place his son (S.) with the paternal grandfather (grandfather), and then terminated parental rights. We find no abuse of discretion and therefore affirm.

FACTUAL AND PROCEDURAL BACKGROUND

S., then five years old, was detained after he was found riding his bicycle on a busy highway on April 25, 2006. When police took him to his home, where he lived with his father and paternal grandmother, they discovered a meth lab in the home. The father and paternal grandmother were arrested. While the grandmother was subsequently freed and was not prosecuted, the father, who had violated his parole, was incarcerated. The mother's whereabouts were unknown. A dependency petition was filed by the Department of Children and Family Services (Department).

On May 22, 2006, the Department interviewed grandfather about the possibility of S. being placed in his care. He said he was interested in visitation, but was retired with a degenerative disc in his back and would therefore be unable to care for the child. He stated, however, that if there were no other options for placement, he would make necessary arrangements to care for S. so that he would not have to remain in foster care.

On July 5, 2006, the petition was sustained, the child was declared a dependent of the court, custody was taken from the parents and given to the Department for suitable placement, and family reunification services were ordered for father. The Department was ordered to address the possibility of placement with the paternal grandmother (who

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[1] All statutory references are to the Welfare and Institutions Code, unless otherwise specified.

had cared for S. most of his life). The paternal grandfather (who was divorced from the grandmother) was given unmonitored visits. S. was placed in foster care.

On December 11, 2006, when it was learned that S. needed to be moved to a new placement because the foster home did not want to adopt him, the dependency court ordered that S. not be placed in any home that was not a prospective adoptive home. The Department's report for that date stated that grandfather had unmonitored, overnight visits with S. every weekend. Grandfather had stated he wanted to continue to build a relationship with S. through visitation, but would not be able to adopt S.

On April 9, 2007, after learning the father's earliest possible release from incarceration would be in September 2009, the court terminated the father's reunification services and set the matter for a permanency planning hearing under section 366.26 to be held on August 14, 2007. The Department was ordered to initiate home studies on several friends and relatives proposed by the father, but all were eventually rejected.

At an August 2, 2007 meeting with a Department social worker at his home, grandfather stated he was not sure if he would be able to commit to all of the responsibilities of a parent, and "would possibl[y] be open to [S.] being adopted by an adoptive family if the family would still allow him to continue his visitation with [S.]."

In its August 7, 2007 report for the permanency planning hearing, the Department indicated it had located a prospective adoptive family with an approved home study on file (Mr. and Mrs. R.), but that grandfather had contacted the Department on June 26, 2007 and stated his interest in adopting S. Grandfather had not come forward earlier because he thought the paternal grandmother was going to adopt S. Grandfather claimed he had been regularly visiting S. on weekends, but Department personnel said he had not maintained visitation or contact "for months until very recently."[2] The report also stated

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[2] The grandfather told the Department that he and C.V., his ex-fiancée (who had expressed interest in adopting S. herself) had decided to end their relationship, and that he

grandfather was "observed to be rude to DCFS staff, argumentative and confrontational which is an issue of concern as he expressed that the department would require too much 'running around' by prospective adoptive Caregivers."

The court continued the permanency planning hearing to December 5, 2007, to allow the Department to conduct further assessments of parties interested in adoption, and indicated the minor could not be placed in a home that did not have an approved adoptive home study.

The Department's December 5, 2007 report stated that grandfather had decided not to adopt S., resulting in the closure of his home study application on August 9, 2007. (Grandfather later reported the home study had been closed because he was misinformed that he could continue visitation after an adoption by the R.'s was finalized.) S. had visited with the R.'s on five dates in October and five dates in November and December, and the Department "anticipated that [S. would] be placed in their home in the next few weeks prior to the end of the year."

On December 5, 2007, the father filed a section 388 petition, asking the court to change its placement orders, requesting placement with the paternal grandmother or alternatively with grandfather, and indicating all relatives were willing to adopt. The court granted a hearing, set for March 5, 2008, as to placement with grandfather. The court ordered the Department to "begin transition to home with approved home study," to reinitiate the adoptive home study on grandfather and to submit an adoptions process progress report for February 1, 2008.

The Department's February 1, 2008 report showed the adoption caseworker's intention to use the papers already filed in grandfather's suspended home study, but the caseworker did not obtain those papers until January 8, 2008. The caseworker first met with the grandfather on January 15, 2008, issued requests for medical and psychological

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did not want to come in between the relationship S. shared with C.V. (with whom S. had visited regularly).

information on January 22, 2008 and scheduled another visit with grandfather "to begin home study interviews" for February 1, 2008. Grandfather informed the caseworker that his main concern was losing contact with his grandson, and when he found out visitation was not guaranteed, he decided he would rather adopt than lose contact with S. He wanted what was best for S. and would be supportive of the current prospective adoptive home if he could be guaranteed visitation. Discussions between the R.'s and the caseworker about visitation were started, but nothing had been arranged. The report stated "[S.] is scheduled to move into the home of his prospective adoptive parents on 02/01/08."

At the February 1, 2008 hearing, the court ordered the Department to "hold off on transitioning the child until we come back February 8th." The court observed that "[i]t is not clear from the report whether the grandfather really, really wants to adopt or just wants to ensure that he's able to maintain a relationship with [S.]." The court continued the matter for one week, and stated grandfather should be in court on February 8 "to give some clarification to the court regarding his desires . . . ." The court observed that the hearing on the petition for placement with grandfather was "not until March 5th, but the Department needs to understand the relative preference is in effect and how this impacts their decision right now on transitioning."

On February 8, the Department reported that grandfather and the R.'s agreed to participate in mediation "to further discuss a post adoption visitation plan as continued discussion is needed." Everyone, including grandfather, agreed to placing S. in foster care with the R.'s while they and grandfather tried to reach an agreed visitation schedule.[3]

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[3] At the February 8 hearing, the grandfather said, "The reason I had stated that at the last meeting we had, that I told them he – the idea was – was to get [S.] with somebody. They had not finished the home study on me yet. So I said I – it was okay if he went with the prospective adoptive foster caretakers."

The report said that grandfather "has stated that if he can come to an agreement with the prospective adoptive parents at mediation, he would close out his home study."

At the February 8 hearing, however, grandfather stated that he wanted custody, and "that's the priority." The court specifically asked him, in view of his statements to caseworkers that his real priority was ensuring a relationship with S., "which is the priority," and grandfather replied, "Priority is I want custody of him." The court said it would not place with grandfather "today because we don't have an adoptive home study." The court observed:

> "So, what happens with the relative placement if the Department places there [with Mr. & Mrs. R.] today? [¶] The only reason the relative preference is in effect is because he has to be moved, once he's been moved, there's no longer relative preference, unless people want to tell me that they're okay with me, at least considering the relative placement [in] effect until the hearing on 388."

The court then stated that it "no longer is impeding the transition to the prospective adoptive parents," the relative preference was "to be in effect until the hearing on the 388" on March 5, and the adoptive home study on the grandfather was to proceed.

On February 12, 2008, the Department placed S. in the R.'s care as a foster care placement.

On March 5, 2008, the grandfather's home study was still pending, and no mediation on visitation had taken place. The Department's March 5 report referred to "conflicting information" received from one of the grandfather's physicians, and stated it was "unclear at this time whether paternal grandfather will be approved for adoption." The court continued the matter to April 22, and then to April 29.

The Department's April 22 report indicated that another "livescan" report was needed for grandfather's home study (due to a caseworker error), which was to be

done on April 17, and "[o]nce the results of the Livescans come in [the caseworker] can submit the completed Home study to her [supervisor]." The report also indicated that, while grandfather "loves [S.] and has had an existing relationship with [S.] from the time that he was one year of age, his reasons for adopting have not focused on the desire to provide permanency but have focused on not wanting to lose contact with [S.]." One of grandfather's physicians told the Department that if grandfather "does not get the chance to adopt, I do not feel that he would be devastated as he is really playing it both ways because he wants to maintain contact." The Department's report assessed both grandfather and the R.'s, and concluded S. would benefit most from being adopted by the R.'s, while allowing grandfather "to continue to have a relationship with [S.] as mediated through the Children's Consortium." The Department "believed that they will be able to work something out for visitation under a Post-Adoption contract." The report said the R.'s were "very open to maintaining contact with [S.'s] Grandfather and want to ensure that visitation is safe and appropriate"; currently the R.'s were "not comfortable with overnight visitation with [S.'s] Grandfather."

The caseworker spoke to S. (then seven years old) on March 25, 2008, after he had been living with the R. family for six weeks. When asked whom he would stay with if he had a choice between grandfather and the R.'s, S. said he wanted to stay with his current caregivers.

At the hearing on April 29, 2008, father's counsel observed that grandfather's home study had not been completed, and requested a continuance. The court denied the request, and father's counsel offered no witnesses, except that the parties stipulated the father would testify to his desire the child be placed with grandfather. The minor's counsel, when asked if she was "aligned with the Department" in denying the father's section 388 petition for placement of S. with grandfather, replied, "At this time, yes. There is not a completed home study on the paternal grandfather." The juvenile court thereupon denied the section 388 petition, explaining:

> "First off, the grandfather's home has not been approved yet. We still don't have criminal clearances because of problems with fingerprints, but more than that, he has not been in the last couple of hearings which tells me, I truly am convinced from the evidence, that the grandfather's main interest is in having visitation and contact, and the only reason he's asking for placement is because he's concerned that if he – if the child is adopted by someone else that he won't get that visitation and contact. [¶] I'm really concerned that it's not in his best interest, even if I could place with the child [*sic*], it's not in the best interest of the child to be placed with the grandfather at this time because of his level of – although he's willing to adopt, willing to do everything, I'm [not] too convinced that that level of commitment is truly based upon his desire to have full time care for the child, but even without getting that far, I cannot place at this time. So the 388 petition is denied."

The court then found S. was adoptable, terminated parental rights, and transferred care, custody and control of S. to the Department for purposes of adoptive planning and placement. The caretakers were given discretion to permit continued contact with biological relatives. When S.'s counsel stated she wanted the Department "to continue with the home study for the paternal grandfather," the Department objected, and the court stated: "Well, that is all that is pending, that's not the Department's only reason for opposing placement." The court then stated that S.'s counsel had "pushed the issue" and the court was "identifying the current caretakers as the prospective adoptive parents" (an order which was vacated because S. had not been with the R.'s for six months).

The father filed a timely appeal from the trial court's April 29, 2008 order.

DISCUSSION

The father contends the juvenile court failed to adhere to the legislative preference for relative placement contained in section 361.3. Specifically, father says the court abused its discretion by refusing to place S. with grandfather "on grounds not based in statutory or case law," namely, the lack of a home study of grandfather. Further, father contends, the court abused its discretion because it did not independently determine whether placement of S. with grandfather was appropriate.

Before turning to the particulars of this case, we review the statutory provision on relative placement, the precedents applying it and our standard of review.

1. Section 361.3.

Section 361.3, subdivision (a) provides, in any case where a child is removed from the physical custody of his or her parents, that "preferential consideration shall be given to a request by a relative of the child for placement of the child with the relative." "Preferential consideration" means that "the relative seeking placement shall be the first placement to be considered and investigated." (§ 361.3, subd. (c)(1).) Preferential consideration does not create an evidentiary presumption in favor of a relative, but commands """that relatives be assessed and *considered* favorably, subject to the juvenile court's consideration of the suitability of the relative's home and the best interests of the child."""" (*In re Antonio G.* (2007) 159 Cal.App.4th 369, 377, quoting *In re Stephanie M.* (1994) 7 Cal.4th 295, 320 (*Stephanie M.*).)[4] Relatives desiring placement "shall be assessed according to the factors enumerated in [subdivision (a)]." (§ 361.3, subd. (a).)

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[4] *In re Antonio G.* continued: "Section 361.3 promotes a preference for foster placement with relative caregivers as set forth in Family Code section 7950 and helps meet 'the statutory requirement of Section 16000 of the Welfare and Institutions Code that a child live in the least restrictive and most familylike setting possible.'" (*In re Antonio G., supra,* 159 Cal.App.4th at p. 377, quoting Stats. 2001, ch. 653, § 1.)

These include the best interest of the child, the wishes of the parent, the good moral character of the relative, the nature and duration of the relationship between the relative and the child, the relative's ability to provide a secure and stable environment, and so on.[5] (*Ibid.*) After the dispositional hearing, if a change in the child's placement must be made, there is a subtle but significant change in the required analysis:

> "[W]henever a new placement of the child must be made, consideration for placement shall again be given . . . to relatives who have not been found to be unsuitable *and who will fulfill the child's reunification or permanent plan requirements.*" (§ 361.3, subd. (d), italics added; see *Cesar V. v. Superior Court* (2001) 91 Cal.App.4th 1023, 1032 (*Cesar*

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[5] Section 361.3, subdivision (a) lists the following factors: "(1) The best interest of the child, including special physical, psychological, educational, medical, or emotional needs. [¶] (2) The wishes of the parent, the relative, and child, if appropriate. [¶] (3) The provisions of Part 6 (commencing with Section 7950) of Division 12 of the Family Code regarding relative placement. [¶] (4) Placement of siblings and half siblings in the same home, if that placement is found to be in the best interest of each of the children as provided in Section 16002. [¶] (5) The good moral character of the relative and any other adult living in the home, including whether any individual residing in the home has a prior history of violent criminal acts or has been responsible for acts of child abuse or neglect. [¶] (6) The nature and duration of the relationship between the child and the relative, and the relative's desire to care for, and to provide legal permanency for, the child if reunification is unsuccessful. [¶] (7) The ability of the relative to do the following: [¶] (A) Provide a safe, secure, and stable environment for the child. [¶] (B) Exercise proper and effective care and control of the child. [¶] (C) Provide a home and the necessities of life for the child. [¶] (D) Protect the child from his or her parents. [¶] (E) Facilitate court-ordered reunification efforts with the parents. [¶] (F) Facilitate visitation with the child's other relatives. [¶] (G) Facilitate implementation of all elements of the case plan. [¶] (H) Provide legal permanence for the child if reunification fails. [¶] However, any finding made with respect to the factor considered pursuant to this subparagraph [H] and pursuant to subparagraph (G) shall not be the sole basis for precluding preferential placement with a relative. [¶] (I) Arrange for appropriate and safe child care, as necessary. [¶] (8) The safety of the relative's home . . . ."

V.) [relative preference applies "when a new placement becomes necessary after reunification services are terminated but before parental rights are terminated and adoptive placement becomes an issue"].)[6]

The juvenile court is required to consider the factors identified in section 361.3, subdivision (a), "in determining whether placement with a particular relative who requests such placement is appropriate."[7] (*In re Antonio G., supra*, 159 Cal.App.4th at p. 377.) Although all the statutory factors are important (*id.* at p. 379), the "linchpin" is always the best interest of the child. (*In re Robert L.* (1993) 21 Cal.App.4th 1057, 1068.) "In the context of a motion pursuant to section 388 for change of placement after the termination of reunification services, the predominant task of the court was to determine the child's best interest . . . ." (*Stephanie M., supra*, 7 Cal.4th at p. 320.) As *Stephanie M.* states, "the court is not to presume that a child should be placed with a relative, but is to determine whether such a placement is *appropriate*, taking into account the suitability of the relative's home and the best interest of the child." (*Id.* at p. 321.) In *Stephanie M.*, the Supreme Court upheld "the considered judgment of the juvenile court that a change of placement [to the grandmother] was not in the child's best interest, in view of her fragile emotional state and her successful and enduring bond with the foster parents." (*Ibid.*)

When section 361.3 applies to a relative placement request, "the juvenile court must exercise its independent judgment rather than merely review [the Department's] placement decision for an abuse of discretion." (*Cesar V., supra*, 91 Cal.App.4th at pp.

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[6] "During the reunification period, the preference applies regardless of whether a new placement is required or is otherwise being considered by the dependency court." (*In re Joseph T., Jr.* (2008) 163 Cal.App.4th 787, 795.) The relative placement preference does not apply after parental rights have been terminated and the child has been freed for adoption. (*In re Cesar V., supra*, 91 Cal.App.4th at p. 1031.)

[7] Subdivision (a)(8) of section 361.3 "requires the social services agency to investigate and report on the ability of relatives seeking placement with respect to the enumerated factors." (*In re Antonio G., supra*, 159 Cal.App.4th at p. 377.)

1033, 1034 [where reunification services have been terminated, parental rights have not yet been terminated and the child has not yet been referred to the Department for adoptive placement, "the juvenile court has the power and the duty to make an independent placement decision under section 361.3"].)

2. Standard of review

A decision under section 361.3 regarding placement with a relative is reviewed for abuse of discretion. (*Stephanie M., supra,* 7 Cal.4th at pp. 319-320.) "[T]he trial court's ruling should not be disturbed on appeal unless an abuse of discretion is clearly established. [Citations.] As one court has stated, when a court has made a custody determination in a dependency proceeding, "'a reviewing court will not disturb that decision unless the trial court has exceeded the limits of legal discretion by making an arbitrary, capricious, or patently absurd determination [citations].'" [Citations.] And we have recently warned: 'The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court.'" [Citation.]" (*Id.,* at pp. 318-319.) "'Broad deference must be shown to the trial judge. The reviewing court should interfere only "'if we find that under all the evidence, viewed most favorably in support of the trial court's action, no judge could reasonably have made the order that he did.' [Citations.]" [Citation.]' [Citation.]" (*Alicia B. v. Superior Court* (2004) 116 Cal.App.4th 856, 863.) Where substantial evidence supports the order, there is no abuse of discretion. (*Michael U. v. Jamie B.* (1985) 39 Cal.3d 787, 796; *In re Daniel C. H.* (1990) 220 Cal.App.3d 814, 839.)

3. The standing question.

As a preliminary matter, we note and reject the Department's argument that the father does not have standing to raise the relative placement preference issue. The Department relies on *Cesar V.*, in which the court observed that the father, who had stipulated to the termination of reunification services, had no standing to appeal the relative placement preference issue.[8] (*Cesar V., supra*, 91 Cal.App.4th at p. 1035 [denial of placement with grandmother did not affect father's interest in reunification with his children; an appellant cannot urge errors which affect only another party who does not appeal].) Other courts, however, have held to the contrary:

- In *In re Esperanza C.* (2008) 165 Cal.App.4th 1042 (*Esperanza C.*), the court observed that, "[u]ntil parental rights are terminated, a parent retains a fundamental interest in his or her child's companionship, custody, management and care." (*Id.* at p. 1053.) Where the mother's parental rights had not yet been terminated (at the time of the proceeding), the mother had standing to appeal the denial of her section 388 petition asking the court to review the agency's decision placing the child in a prospective adoptive home and instead to place the child with her maternal great-uncle. (*Id.* at pp. 1050-1051, 1053-1054.) The court observed that placement with a relative "has the potential to alter the juvenile court's determination of the child's best interests and the appropriate permanency plan" and "may affect a parent's interest in his or her legal status with respect to the child," so that "[w]e resolve doubts in favor of [mother's] right to appeal".) (*Id.* at p. 1054.)

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[8] However, since the grandmother properly placed the issue before the court of appeal, and the issue was extensively litigated in the juvenile court, the father was permitted to support the grandmother's arguments with arguments of his own. (*Cesar V., supra*, 91 Cal.App.4th at p. 1035.)

- In *In re Elizabeth M.* (1997) 52 Cal.App.4th 318, 320-321, the court affirmed the termination of parental rights and the denial of the mother's section 388 motion for placement of the child with her cousins. However, it rejected contentions that, because the mother's interest in custody and care of the child were not directly impacted, the mother lacked standing to raise the placement issue. The court observed that the mother was appealing the denial of her petition for a hearing under section 388; that she was statutorily empowered to file such a petition; and that "her interest in doing so is to promote the best interests of the child (§ 388), not her interest in custody or reunification." (*Id.* at p.324 ["as the petitioner, she must have standing to appeal the ruling"]; see also *In re H.G.* (2006) 146 Cal.App.4th 1, 9-10 [although parent-child reunification was no longer a goal, parents "retained a fundamental interest in [child's] companionship, custody, management and care," and had standing to challenge order under section 387 removing child from care of grandparents].)

We note that *Caesar V.* is distinguishable in that it did not hold a parent has no standing to appeal the denial of a section 388 petition. In any event, find *Esperanza C.*, *In re Elizabeth M.* and *In re H.G.* persuasive, and, as in *Esperanza C.*, "[w]e resolve doubts in favor of [father's] right to appeal." (*Esperanza C.*, *supra*, 165 Cal.App.4th at p. 1054.)

4. Application of section 361.3 to this case.

We think the trial court complied with the statutory mandate to give preferential consideration to the request for placement with the grandfather, and properly exercised its discretion in choosing the alternative placement.

We begin by emphasizing the posture of S.'s case at the time of the challenged ruling. Reunification services had been terminated and a foster placement was being terminated because the foster parents were unwilling to adopt. The juvenile court was rightly concerned with the passage of time and anxious to place S. for potential adoption.

Thus, pursuant to section 361.3, subdivision (d), a threshold requirement for a relative preference was a family member who would "fulfill the child's . . . permanent plan requirements."[9]

The juvenile court clearly expressed its view that placing S. with grandfather was not in the child's best interest because grandfather's motivation for seeking placement was to remain in contact with S. (which adoption by someone else might preclude), rather than a "desire to have full time care of the child . . . ." This was a reasonable conclusion in light of grandfather's history of uncertainty about his ability and/or willingness to handle full-time parenting. In light of the requirements of section 361.3, subdivision (d), noted above, the juvenile court was required to consider grandfather's ability to carry out the permanent plan for adoption. It was not an abuse of discretion for the juvenile court to conclude that S.'s best interest would be served by placement with a family motivated to adopt and open to establishment of a plan allowing grandfather and other family members to visit.

As noted by the Department, the record contains ample evidence that the relative placement preference was considered by the court and overridden. At several earlier hearings the court indicated its awareness of the preference. The court had before it reports reflecting other relevant concerns. The Department had expressed doubt that grandfather would protect S. from the relatives whose conduct had brought S. into the system in the first place. Grandfather himself had expressed doubt about his physical ability to take S. to counseling and therapy on a regular basis.

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[9] This is where we part company from the dissent, which does not acknowledge the impact of section 361.3, subdivision (d). In our view, that subdivision establishes a relative's ability to fulfill permanent plan requirements as a threshold requirement for consideration of a relative placement where, as in the present case, reunification services have been terminated. Accordingly, by statute, the permanency issue was more than just one of the factors for the court's consideration.

Under all these circumstances, it was not an abuse of discretion for the court to act without the formal completion of the home study and to conclude, in effect, that placement with grandfather was simply not in S.'s best interest. In light of the court's expressed concern with the amount of time that had passed without a permanent placement, the court acted properly in moving forward.

5. Conclusion.

Although the juvenile court could have more fully articulated its analysis of the applicable statutory factors, we find that its statement of reasons was adequate and its decision, on this record, was a proper exercise of discretion. The order terminating parental rights and related orders are affirmed.[10]

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[10] We note and reject appellant's claim that the Department is estopped from asserting the correctness of the placement order by failing to complete the adoptive home study. The study was substantially complete, lacking only a criminal background check. This omission did not play a role in the juvenile court's decision. Further, much of the delay was caused by grandfather's equivocation about whether he wanted to adopt. It is abundantly clear that completion of the study would not have changed the outcome in this case.

DISPOSITION

The order denying the section 388 petition is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

O'NEILL, J.[*]

I concur:

BIGELOW, J.

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[*] Judge of the Ventura Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Flier, J., Dissenting

I respectfully dissent. I would reverse the juvenile court's order and remand for further proceedings.

I agree with the majority that the issue in this case is whether the juvenile court failed to properly consider statutory provisions on relative placement preference when it denied father's petition to place his son with paternal grandfather, and then terminated parental rights. I cannot agree, however, with the implicit conclusion of the majority that the trial court considered all, or even a majority, of the factors set forth in Welfare and Institutions Code section 361.3 (section 361.3).

As the majority notes, the trial court concluded that grandfather sought to adopt S. because he did not want to lose contact with the child; the trial court was not satisfied that grandfather actually wanted to assume the parental role permanently. In other words, the trial court's focus was on subdivision (a)(6) of section 361.3, i.e., the "nature and duration of the relationship between the child and the relative, *and the relative's desire to care for, and to provide legal permanency* for, the child if reunification is unsuccessful" (emphasis added), and on subdivision (a)(7)(H), which also addresses "legal permanence for the child if reunification fails."

Grandfather's actual state of mind about permanently assuming the parental role is very difficult to determine; very possibly grandfather himself may have found this a hard question to answer. The highly subjective determination about grandfather's actual state of mind should have been supported by the other facts and circumstances that are outlined in section 361.3, and particularly in subdivision (a)(7). As it is, the record is, for the most part, silent on the factors set forth in section 361.3, a circumstance that is

unfortunately exacerbated by the fact that the home study was not completed. Coming to a conclusion without a completed home study was, in my opinion, also an error.

The trial court's narrow focus is not a defect of form but of substance. The matter of adoption is necessarily a composite of a number of considerations; section 361.3 clearly recognizes this. The trial court should not have focused solely on one factor but should have addressed the other considerations set forth in section 361.3. This is particularly true when it comes to the factor of permanence. Significantly, subdivision (a)(7)(H), which speaks of permanence, is followed by a caveat that was ignored in this case. That caveat is: "However, any finding made with respect to the factor considered pursuant to this subparagraph [H] and pursuant to subparagraph (G) shall not be the sole basis for precluding preferential placement with a relative."

This caveat recognizes that permanence in an adoption by a relative presents a unique and particularly difficult question. There is therefore every reason to support a conclusion reached about this issue with a consideration of other relevant factors.

While I have no doubt that the trial court approached the question of permanence sensitively, it should not have focused on permanence to the exclusion of all other factors. I would remand with directions to consider the balance of the factors set forth in section 361.3 and the completed home study.

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FLIER, Acting P. J.